TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1925

No. [redacted] 41

SAMUEL FREEDMAN, PETITIONER,

vs.

W. S. ATKINS

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED [illegible]

CERTIORARI GRANTED APRIL 5, 1926

(30,150)

(30,150)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 300

SAMUEL FRESHMAN, PETITIONER,

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ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 4, 1924

[fol. 1] CAPTION—Omitted

[fol. 2] **IN UNITED STATES DISTRICT COURT**

PETITION OF BANKRUPT FOR DISCHARGE—Filed Feb. 18, 1923

To the honorable the judges of the District Court of the United States for the Northern District of Texas:

Samuel Freshman, bankrupt, of Dallas, County of Dallas and State of Texas, in said District, respectfully represents:

That on the 14th day of November, 1922, he was adjudged a bankrupt under the Act of Congress relating to bankruptcy; that he has duly surrendered all his property and rights of property and has fully complied with all the requirements of said Act, and of the orders of the Court pending this bankruptcy.

Wherefore, he prays that he may be decreed by the Court to have a full discharge from all debts provable against his estate under said Bankrupt Act, except such as are exempted by law from such discharge.

Dated this 3rd day of February, 1923.

(Signed) Samuel Freshman, Bankrupt.

[fol. 3] Jurat showing the foregoing was duly sworn to by Samuel Freshman; omitted in printing.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTICE OF OBJECTION TO DISCHARGE—Filed April 1, 1923

(Letterhead of W. S. Atkins)

"March 29, 1923.

"Mr. E. M. Baker, Referee in Bankruptcy, Prætorian Bldg., Dallas, Texas.

"DEAR SIR: I wish to enter a protest against the discharge of Samuel Freshman from bankruptcy, which is to come up on April 2, 1923.

"When Mr. Freshman was before the previous Referee in Bankruptcy he could not give a satisfactory reason for the vast number of notes and what became of the money derived from the notes and [fol. 4] why some or all of the money was not used to pay for cur-

rent and past bills, also why his stock of merchandise was so low as none of the many barrels supposed to have contained whiskey in his saloon had over several gallons of whiskey in any of them, also all of the whiskey that he had in the bonded warehouse was mortgaged to the limit to the banks, this rent unpaid for many months past amounting to about $2,200, also why he had deeded his property containing as I remember about 100 acres, to his wife just previous to the failure. This property was in Palo Pinto County. There were several other points that Mr. Freshman could not satisfactorily explain which I can not remember, but the whole failure was too much of a fraud and every appearance of a dishonest failure to get his discharge.

"I am protesting the discharge now for the above reasons and since then he has made no effort to pay any part to the creditors and now files a report showing no assets whatever.

Yours truly, (Signed) W. S. Atkins, Representing the Estate of George T. Atkins, Deceased."

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

SPECIFICATIONS OF OBJECTION TO DISCHARGE—Filed April 10, 1923

George T. Atkins and W. S. Atkins of Dallas, Texas, creditors of the above named bankrupt, having provable claims allowed by the former Referee in said proceedings, do hereby oppose granting to [fol. 5] said Samuel Freshman of a discharge from his debts, and for the grounds of such opposition do file the following specifications:

(1) For the reason that with intent to conceal his true financial standing, he has destroyed the books of accounts or records from which such financial condition might be ascertained.

(2) That no accurate record of notes or disbursements of the proceeds were kept.

(3) That he built a building in his minor child's name, and admits that part of the money paid on building came from the business and part from the notes sold. His business at this time appeared to be in an insolvent condition.

(4) The method of buying a tract of land in Palo Pinto County and transferring same to his brother-in-law just prior to going into bankruptcy. If this act was not a fraudulent concealment of assets, it was a very irregular transaction.

Wherefore, objection is made to the granting of such application for discharge.

(Signed) W. S. Atkins, Objecting Creditor.

Jurat showing the foregoing was duly sworn to by W. S. Atkins omitted in Printing.

[fol. 6] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

EXCEPTIONS AND DEMURRERS OF BANKRUPT TO OBJECTION AND SPECIFICATIONS OF OBJECTION TO DISCHARGE—Filed April 27, 1923

To the honorable the Judges of said court and to Honorable E. M. Baker, referee in bankruptcy:

Samuel Freshman, bankrupt, having filed herein a petition for discharge, to which an objection was filed on April 1, 1923, and to which specifications were filed, towit, on April 10, 1923, by Messrs. Geo. T. Atkins and W. S. Atkins, on which specifications a hearing before the referee has been set for April 27, 1923, does now, before the said hearing, demur and except to the said specifications and each of them on the following grounds:

1. The specifications as a whole are insufficient and should be dismissed for the reason that it is not shown that those objecting are creditors who will be affected by the discharge and are interested in defeating it.

2. The first specification:

"For the reason that with intent to conceal his true financial condition he has destroyed books of account or records, from which such financial condition might be ascertained."

[fol. 7] is insufficient and should be dismissed for the reason that the averment that books "or" records were destroyed is in the alternative and is, therefore, uncertain, lacking in explicitness, and lacking sufficient certainty of detail.

3. The second specification:

"That no accurate record of notes or disbursements of the proceeds were kept."

is insufficient and should be dismissed for the reasons that:

(a) The specification is vague, uncertain and indefinite.

(b) It is not alleged that any failure to keep any record was with intent to conceal the financial condition of the bankrupt.

(c) It is not alleged that the record of notes or disbursements of the proceeds were not such that the financial condition of the bankrupt might have been ascertained therefrom.

(d) The allegation that the record of the notes "or" disbursements of proceeds was not accurately kept, is an alternative averment, which is, for that reason, lacking in explicitness.

[fol. 8] 4. The third specification:

"That he built a building in his minor child's name and admits that part of the money paid on building came from the business and part from the notes sold. His business at the time appeared to be in an insolvent condition."

is insufficient and should be dismissed for the reasons that:

(a) The specification is uncertain, indefinite and vague.

(b) The specification does not contain allegations of sufficient certainty of detail, there being no specific or clear reference to what building was built, when the same was built, in whose name the same was built, or where the money with which the same was paid for came from; what business is meant is not specifically stated; what notes were sold is not specifically stated; a greater particularity of averments is necessary; "specifications must be clear and unequivocable and contain specific averments of facts."

(c) It is not alleged that the bankrupt at the time referred to was insolvent, or that any business in which he was then engaged was in an insolvent condition.

(d) It is not alleged that the bankrupt transferred or removed or destroyed or concealed, or permitted to be removed or destroyed [fol. 9] or concealed, any of his property, either within the four months immediately preceding the filing of the petition, or theretofore. with intent to hinder or delay or defraud his creditors, or any of them.

5. The fourth specification:

"The method of buying a tract of land in Palo Pinto County, and transferring same to his brother-in-law just prior to going into bankruptcy. If this act was not fraudulent concealment of assets, it was a very irregular transaction."

is insufficient and should be dismissed for the reasons that:

(a) The specification is vague, uncertain and indefinite.

(b) The specification does not contain allegations of sufficient certainty of detail, what land is intended to be referred to being not stated, the method of buying or of transferring the same not being stated, the person to whom the same was transferred not being stated, the time when the same was bought and the time when the same was transferred not being stated; there being a fatal lack of particularity of allegations.

(c) The allegation that if the act was not a fraudulent concealment of assets, it was a very irregular transaction, is in the alternative, and is, therefore, uncertain and inexplicit.

[fol. 10] (d) The allegation that the act was an irregular transaction, if not a fraudulent concealment of assets, is too general and is a conclusion and not an allegation of fact.

(e) It is not alleged that the bankrupt transferred or removed or destroyed or concealed, or permitted to be removed or destroyed or concealed, any of his property, either within the four months immediately preceding the filing of the petition, or theretofore, with intent to hinder or delay or defraud his creditors, or any of them.

Wherefore, the bankrupt prays that the specifications as a whole, and each of them separately, be dismissed and that, in the absence of proper specifications of objections the referee recommend, and the District Court order, the discharge of the bankrupt as he has heretofore prayed.

Dated at Dallas, Texas, this April 27th, A. D. 1923.

(Signed) Samuel Freshman, Bankrupt. Etheridge, McCormick & Bromberg, Paul Carrington, His Attorneys of Record.

[File endorsement omitted.]

[fol. 11] IN UNITED STATES DISTRICT COURT

REPORT OF REFEREE IN BANKRUPTCY—Filed June 7, 1923

To the Honorable William H. Atwell, judge of said court:

Transcript of the proceedings relating to discharge in this matter is herewith submitted.

The discharge of the bankrupt is recommended for reasons fully set out in the attached papers based upon the proceedings and testimony, also fully set out.

Respectfully submitted, (Signed) E. M. Baker, Referee in Bankruptcy.

Dated at Dallas, Texas, this the 7th day of June, A. D. 1923.

RECORD OF PROCEEDINGS ATTACHED TO SAID CERTIFICATE

On this 27th day of April, A. D. 1923, came on to be heard the above styled matter, a petition for discharge having been duly filed by the bankrupt on February 8th, 1923, notices thereof having been

duly published and mailed by the referee to the respective creditors listed notifying each that any opposition to the discharge must be evidenced by an appearance in the office of the referee on or before [fol. 12] April 2nd, 1923, to that end, an objection to such discharge having been filed with the referee on, to-wit, April 1, 1923, by W. S. Atkins, representing estate of George T. Atkins, deceased, the said W. S. Atkins as objecting creditor having filed specifications of objection with the referee on April 10th, 1923, and no other person or creditor having appeared to oppose or having opposed, or having specified objection to, the discharge of the bankrupt, and notice of a hearing on this date on the issues raised by the said specifications of objection filed by W. S. Atkins having been duly served on all parties of interest.

Pursuant to such notice there appeared before the referee at 10:00 a. m. on this day the said W. S. Atkins, Samuel Freshman, the said bankrupt, and Paul Carrington of the firm of Etheridge, McCormick & Bromberg, representing the said bankrupt as attorney. Proceeding then to a hearing on the said specifications, the said bankrupt presented to the referee his demurrers and exceptions to the said specifications and the said objections, as therefore filed in the office of the referee, which said demurrers and exceptions were presented separately to the referee and considered and each overruled, to each of which actions by the referee the bankrupt excepted.

Thereupon the said specifications being presented to the referee for a hearing on the merits, and the bankrupt having been duly sworn to tell the truth, the whole truth and nothing but the truth, the referee asked Mr. Atkins what evidence, if any, he desired to proffer in support of his specifications. The reply of Mr. Atkins was that he desired to proffer in evidence the record of the bankrupt proceedings [fol. 13] numbered 1211 in bankruptcy on the docket of the district court of the United States for the Northern District of Texas, at Dallas, including the testimony introduced in evidence in those proceedings before the Honorable Eugene Marshall, Esq., Referee in Bankruptcy. To this proffer of evidence the bankrupt interposed the objections that such record including such testimony was irrelevant and immaterial to the issues raised by the specifications filed in these proceedings, and that no predicate had been laid for the introduction of such evidence, there having been made no showing that the witnesses who testified in the former proceedings were not now available for testifying before the referee in person and that for the purpose of these proceedings such evidence was secondary, hearsay, and inadmissible. These objections were sustained by the referee.

The referee then asked Mr. Atkins whether he had any other evidence to proffer at this time, Mr. Atkins' reply being in the negative. The referee then asked Mr. Atkins if he desired further time within which to procure witnesses and if he desired to employ attorneys and for them to have an opportunity to investigate the matter, to which inquiries Mr. Atkins responded in the negative, saying that he did not want to "send good money after bad."

The referee then on his own motion interrogated the bankrupt, first stating that he was unwilling to pass upon the question without

[fol. 14] any evidence before him, the testimony of the bankrupt in response to this examination by the referee being as follows:

Q. You are Samuel Freshman, the bankrupt who seeks a discharge in these proceedings?

A. I am.

Q. What books or records have you to show your financial condition?

A. I have none. All the books and records which I had at the time of the previous bankruptcy proceedings I delivered to Mr. Runge, trustee. Last time that I saw them or heard of them he had them. Mr. Runge, however, went away during the war and upon his return after the war the books and records could not be found. They have been misplaced or lost.

Q. You don't know of any destruction of the books?

A. I do not.

Q. Did you have an accurate record of your accounts?

A. I cannot say that it was accurate. The books and records turned over to Mr. Runge were identically of the same character, however, for the period of several years immediately preceding my first bankruptcy proceedings. I had at one time been both in wholesale and retail liquor business and kept very accurate books, having a book-keeper employed for the purpose during that time. When, however, several years before my first bankruptcy proceedings I got out of the wholesale end of the business, I discontinued the employment of a [fol. 15] book-keeper and my books from that time on were not completely accurate. Since discontinuing my business at the time of my adjudication in bankruptcy in 1915, I have been employed on a salary or on a commission basis and have not been engaged in any business either wholesale or retail merchandising, and since that date have had no occasion to keep books or records. Neither my salary nor my commissions during this time have been more than sufficient for my living. For no year have they been enough to require me to pay an income tax, just barely enough for a living.

Q. Did you build a brick building and place it in your minor child's name?

A. That building was put up with his mother's money and some of his own money from rents.

Q. What is the name of this child?

A. Benjamin Moses Freshman.

Q. Is he of age?

A. No.

Q. When did you build the building?

A. In the spring of 1914.

Q. What did it cost?

A. In the neighborhood of $18,000.00.

Q. Where is it located?

A. At the corner of Grand and Second Avenues, Dallas, Texas.

[fol. 16] Q. What is its size?

A. It is fifty feet by one hundred feet, two-story brick.

Q. How much did it rent for when you first built it?

A. It rented in the beginning for $200.00 and that became greater; the street car company was to bring the car in front of the building. It rents for $300.00 now.

Q. On whose land was it built?

A. I deeded the land to my wife in 1906, just before I married her.

Q. When did she die?

A. In 1910.

Q. Did you have any other children?

A. No.

Q. Did she leave a will?

A. No.

Q. Did the child inherit the land as her separate property.

A. Yes, and about six more cottages in her name.

Q. Does -he still own all that?

A. Yes.

Q. Did you also deed the cottages to your wife?

A. Yes, just before I married her.

Q. That was about 1906?

A. Yes.

[fol. 17] Q. When did you file your first petition in bankruptcy?

A. In the fall of 1915.

Q. How much of your own money did you put in this building?

A. I erected the building in the spring of 1914. I then sold some of my own property which is out near where the Terrell interurban is now running; I had put my money in my business and also had put some rents from the cottages and I put the money from the sale of this property into the brick building to equalize for the rents I had put in my business.

Q. How much of your own money did you put in this building?

A. I don't remember. I borrowed some money from the Dallas Mortgage Company in 1913 and I sold this property in 1914.

Q. You do not know how many thousands of dollars you put in the building.

A. No. It has been so long ago. I had dismissed it from my mind.

Q. What was the condition of the business when you placed this money in the brick building.

A. My business was then good. I was not losing money and what I placed in the brick building was not money that I would have put in my business.

[fol. 18] Q. What was it then that caused your failure in business?

A. There was an oil deal in which I lost a good deal of money.

Q. Is that the Palo Pinto County proposition?

A. Yes.

Q. How much did this transaction cost you?

A. Well I bought the ground at about $50.00 per acre.

Q. How many acres?

A. Two hundred.

Q. How did you pay for it? In cash?

A. No, I signed some notes and then I traded some property in South Texas in an effort to pay for the property but later I found I could not meet the notes and that I was going to lose it and my brother-in-law said he would take over the land for the assumption of the notes. There was no other way to dispose of the land that I knew of, for, at that time the oil scare was over and the land wasn't worth anywhere near $50.00 an acre. I do not think it was worth the amount of the notes my brother-in-law assumed. I know he has said that he would be glad to get his money back on the land and I know he would be glad to deed it to any creditor for the amount of the notes which he assumed.

Q. Is this the transaction referred to in the specifications in which it refers to the transfer of land to your brother-in-law before going into bankruptcy?

A. I suppose so.

[fol. 19] Q. Have any of your creditors listed in the first bankruptcy proceedings been paid in full or in part?

A. Mr. Runge, the trustee, had charge of the stock of my business and disposed of it. I do not know what disposition was made.

Q. Have you yourself paid any of the creditors there listed?

A. No.

Q. Have you promised to pay any of them?

A. No.

Q. Are there any creditors referred to in your present schedules that were not referred to in the schedules in your first bankrutcy?

A. Yes, there are several new creditors.

Q. Was it merely that they were omitted from the former proceeding or have they become creditors since that time.

A. They have become creditors since that time, at least those I now recall.

Q. Has your son's property ever been involved in litigation?

A. Yes sir, Mr. Runge as trustee, brought suit in an effort to prove that the property belonged to the creditors in the first bankruptcy proceeding. As I recall this suit was filed in one of the district courts of Dallas County, and was decided in my favor by the trial court and an appeal was taken to the Dallas Court of Civil Appeals by [fol. 20] Mr. Runge as trustee. At any rate, whichever party was the appellant in the court of civil appeals, that court decided in favor of my son and the case was not taken to the supreme court. Since that time there has been no possible doubt about my son's title. I had the guardianship proceedings instituted and myself appointed guardian of my son soon after my wife's death in 1910, and for all these many years have carefully superintended these properties as belonging to the guardianship estate of my son, under the supervision of the county court of Dallas County, Texas.

Q. You stated a little bit ago that the books which you turned over to Mr. Runge were of identically the same character as those which you had kept for many years. That is correct, is it not?

A. Yes, isr.

Q. What was the nature of these books?

A. Well you see since I abandoned my wholesale business, I did business strictly on a cash basis. The only books I kept were the stubs of my checks which showed all disbursements and the books showing merchandise received, containing entries made at the time of the receipt of the item of merchandise, showing the amount and value thereof. These stubs and books containing entries of merchandise received for many years were turned over to the trustee in the original case.

[fol. 21] Q. You have referred to the earlier bankruptcy proceedings. Did you file an application for a discharge there. If so what is the status of that application now?

To this question the bankrupt objected as irrelevant and immaterial to any of the issues presented on the specifications as filed in the present proceedings, there being neither objection or specification referring to or based upon such earlier proceedings, there being the further objection that the testimony elicited is secondary, not the best evidence, hearsay and inadmissible. Which objections being overruled by the referee, and the bankrupt having excepted to such order, the answer thereto was made as follows, subject to such objections and exception:

A. I filed the original petition in the fall of 1915, and was then adjudicated a bankrupt. In May, 1916, I filed my application for discharge, being represented by Messrs. Synnott and Penry. On August 25, 1916, Irish and Thornton as attorneys for the Citizen's State Bank & Trust Company and George Atkins filed notice of opposition to the application for discharge and on August 6, 1916, specifications were filed, the only specification being that with intent to conceal my true financial condition I had failed to keep books of account or records and destroyed books of account or records from which such financial condition might be ascertained. On February 1, 1917, the specifications came on to be heard before Hon. Eugene Marshall, Esq., Referee in Bankruptcy, to whom the same had been referred. No recommendation was made by the referee, but several years later Honorable E. M. Baker, having been appointed referee, [fol. 22] the papers in the case were found and based on them the present referee recommended that a discharge be refused. This recommendation was dated the 21st day of January, 1921. This recommendation made in the cause numbered 1211 in bankruptcy was forwarded to the district court with the record in those proceedings and in the district court Mr. J. H. Synnott, as attorney for the bankrupt filed exceptions to the referee's report and recommendation on June 7, 1922. The said exception, in addition to a reference to the merits of the record on which the recommendation was made challenges the sufficiency and conclusiveness of the record, on the grounds that the depositions were never signed nor sworn to by the witnesses and that the memorandum of the former referee was never signed nor filed by him, being the memorandum on which the present referee largely relied in determining his recommendation, the authority and jurisdiction of the present referee being also challenged on the ground that the matter had never been properly

referred to him by the court. Neither the recommendation nor the exceptions have been acted upon by the district court to this date.

The referee then indicated that his examination of the witness was at an end and again extended the opportunity to Mr. Atkins to examine the bankrupt or to proffer any other evidence on the issues raised by his specifications, whereupon, Mr. Atkins asked the bankrupt a single question:

[fol. 23] Q. Did you not admit in your previous testimony that you used part of your money from notes in building the brick building?

A. I don't remember.

Mr. Atkins not desiring to ask any other questions and not desiring to proffer any evidence, and the bankrupt not desiring to offer any evidence, the referee then took the foregoing testimony, together with the said objections and specifications, under consideration and after duly considering the same, announced in open court on the same day in the presence of Mr. Atkins and Mr. Freshman and his attorney, that the said objections and specifications were in his judgment not supported by the evidence and that therefore his recommendation to the court would be that the discharge prayed for by the bankrupt in these proceedings be granted.

Thereupon the referee dictated in open court, in the presence of Mr. Atkins, the bankrupt and his attorney, the following findings and recommendations:

Findings and Recommendations of the Referee

To the honorable judges of said court:

On this day came on for hearing the application of the bankrupt for a discharge and the objections and specifications filed by W. S. Atkins, the said instruments and the testimony taken to-day, together with the exceptions of the bankrupt to the objections and specifications being attached hereto.

[fol. 24] This case involves, it appears from the testimony here, the same bankrupt and all of the creditors who were involved in the proceedings heretofore filed in this court, being number 1211 in bankruptcy. There are, however, creditors in the present proceedings not involved in the former one. There was an opposition to the discharge in the former proceedings and a large mass of testimony was taken therein. As near as this referee could determine from such testimony and from the memorandum of his predecessor, before whom the same was taken in the previous case, the preceding referee intended to recommend that the discharge in that case should not be granted. Accordingly, this referee recommended to the court that the discharge be not granted as prayed for in the previous bankruptcy proceedings. It appears that this recommendation has never been acted upon and that the matter stands open for any action of a judge of this court.

This case was filed on November 11, 1922; the first meeting has been held, all creditors have been notified of the meeting and notices on the discharge have been sent to all creditors and no creditor has made any objection except the said W. S. Atkins. It appears that the father of W. S. Atkins, George T. Atkins, deceased, was a creditor listed in the previous proceeding and the objection is made but W. S. Atkins does not have sufficient interest as a creditor to make this present opposition. The referee has ruled, however, that such interest does exist, Mr. Atkins having testified that the will of his deceased father has been probated in Dallas County, Texas, making [fol. 25] him a party interested and having testified that it was his money, that of W. S. Atkins, that was loaned to the bankrupt by his father. This exception, as all others made by the bankrupt, to the objections and specifications, is overruled.

The first specification of objection, the referee believes, has not been sustained by any testimony in the present record. It is not shown that he has even had a business that books of account were necessary. The bankrupt conducted a retail liquor business, doing a cash business for several years prior to his previous bankruptcy. The books which he kept showing merchandise received and the stubs of his checks showing disbursements were turned over to the trustee in the original case. Since the fall of 1915 the bankrupt has been a traveling salesman on a salary or on a commission basis, his returns being less than the amount which would make it necesary to pay an income tax, the returns being barely enough for his own personal living expenses.

It is not shown that the bankrupt has ever destroyed books of account or records of any character or has ever attempted to conceal his true financial standing; the uncontradicted testimony is that all books and records were turned over by him to the trustee in the previous bankruptcy case.

The first and second specifications are, therefore, overruled.

The third specification is overruled. The testimony is uncon- [fol. 26] tradicted that the property had belonged, since 1906, to the bankrupt's wife as her separate property, on which the brick building was constructed, and that the land and the building, after its completion was a part of the guardianship estate of the minor son of the bankrupt after the death of the bankrupt's wife. If, however, the creditors were entitled to any equity in the property, the question would be a proper one for determination in the civil courts and would not be the proper basis for the denial of a discharge. The question has ben raised in the state courts by the trustee in the former bankruptcy proceedings and the case brought by the trustee was finally lost, it having been held by the Dallas Court of Civil Appeals that the property was owned entirely by the minor son.

Even if it were a fact that the bankrupt used much of his own money to build improvements on the land of his son, the referee does not believe that such action could prevent his discharge because it was not such a concealment of assets as would prevent a discharge. He had a legal right to do this and therefore the action,

even though it was morally wrong, could not prevent his discharge. Thus we have frequent cases where the bankrupt sells goods which have not been paid for and places the proceeds in exempt property. The money received for the goods morally belongs to the creditors but under the law the bankrupt retains the property and certainly, although he admits in open court that his action defrauded his creditors, morally speaking, the action would not prevent his discharge in bankruptcy because he had a legal right to do that which [fol. 27] he had done. The court cannot consider any code of morals except those which are prescribed by the law. In fact, the court must assume in administering the law that there is no other code of morals, if such alleged code contravenes the law.

The fourth specification is also overruled for the reason that it is not supported by the testimony and for the added reason that it is so indefinite that a discharge cannot be refused thereupon. If any condition did in fact exist, with reference to this Palo Pinto County land, which would have entitled the creditors to any rights in it, the trustee could have recovered this property in the earlier proceedings; the testimony shows that the property is still in the hands of the brother-in-law and the same might be recovered for the benefit of the creditors involved in the present proceedings if they have in equity any rights thereto. This, again, is a matter for the civil courts. The testimony in this record that the brother-in-law took the land in consideration of assuming notes of the bankrupt which were at least equivalent to the value of the land, is uncontradicted, and indicates that the transaction was not an irregular one.

For the reasons above stated, I am obliged to recommend that the objections and specifications to the discharge be overruled and that the discharge prayed for in these proceedings be granted.

In view of my recommendation in the earlier proceedings, above referred to, I have been loath to so recommend. As a matter of law, however, I have considered that my duty is plain to ignore, in view of [fol. 28] the objections and specifications filed herein, the status of the earlier proceedings, and to pass upon the present issues solely on the basis of the testimony properly introduced, on this hearing.

The decisions clearly are that a definite refusal of a discharge in one bankruptcy proceeding may be pleaded and proved as res-judicata to preclude a discharge in a second bankruptcy proceeding, as to the debts provable in the first proceeding; it is definitely established also that a creditor must state as a part of his pleadings in specifying his objections to a discharge in the second proceedings the prior refusal of a discharge, and must, on a hearing, prove such refusal by admissable evidence and that on the failure of any creditor so to do, it is the duty of the court in the second proceedings to grant a discharge as prayed for. A leading case to this effect is that of Bluthenthal vs. Jones, 208 U. S. 64, in which the United States Supreme Court unanimously so held in 1908; quoting from the opinion of Mr. Justice Moody:

"Undoubtedly, as in all other judicial proceedings, an adjudication refusing the discharge in bankruptcy, finally determines for all time

and in all courts, as between those parties or privies to it, the facts upon which the refusal is based. But courts are not bound to search the records of other courts and give effect to their judgment. If there has been a conclusive adjudication of a subject in some other court, it is the duty of him who relies upon it to plead it or in some manner bring it to the attention of the court in which it is sought to be enforced. Plaintiffs in error failed to do this. When an application [fol. 29] was made by the bankrupt in the District Court for the Southern District of Florida, the judge of that court was, by the terms of the statute, bound to grant it unless upon investigation it appeared that the bankrupt had committed one of the six offenses as specified in section fourteen of the Bankruptcy Act as amended. An objecting creditor might have proved upon that application that the bankrupt had committed one of the acts which barred his discharge, either by the production of evidence or by showing that in a previous bankruptcy proceeding it had been conclusively adjudicated, as between him and the bankrupt, that the bankrupt had committed one of such offenses. If that adjudication had been proved, it would have taken the place of other evidence and have been final upon the parties to it. But nothing of this kind took place. Bluthenthal and Bickart intentionally remained away from the court and allowed the discharge to be granted without objection. Since the debt due to the plaintiffs in error was a debt provable in the proceedings before the District Court of Florida and was not one of the debts exempted by the statute from the operation of the discharge, it was barred by that discharge."

The line of authorities to the same effect as this decision has recently been emphasized to my mind because the question was presented in the case numbered 1407 in bankruptcy in this court, the matter of Harry Schwartzberg, bankrupt, which was referred to me [fol. 30] as referee. In that case a discharge was applied for by the bankrupt and no objection or specification of objection thereto was filed by any creditor. It appeared during the hearings, however, that the bankrupt had been refused his discharge in an earlier bankruptcy proceeding involving the same debts as were scheduled in the one then pending before me. On my own motion, therefore, that is to say without the filing of objection or specification of objection, I recommended to this court that the discharge be refused in the second proceeding for the reason that the question had been determined in the earlier one. This recommendation, however, was not followed, an opinion being rendered on January 31st, 1921, by the Honorable E. R. Meek, Judge of this court, to the effect that in the absence of objection or specification of objection in the second proceeding, it was the duty of the court to grant a discharge therein.

This is identically the proposition here presented. There is no objection or specification of objection relating to the previous bankruptcy proceeding of the present bankruptcy, nor is there any proper showing in the present record of the pendency or status of such earlier proceeding. Indeed, it occurs to me that, were there appropriate pleading and proof of the status of the earlier proceedings,

showing my recommendation therein and that the same has never been passed upon by the District Court, my duty would be nevertheless to recommend a discharge in the present proceeding, for a res-judicata could not be shown by the mere recommendation in the [fol. 31] former proceeding or other than by proof of the entry of a final order denying a discharge in the earlier proceeding. See In re Elkind, C. C. A. 2nd C., 175 Fed. 64.

Dated at my office in Dallas, Texas, as of April 27th, 1923.

(Signed) E. M. Baker, Referee in Bankruptcy.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER GRANTING DISCHARGE IN PART AND DENYING DISCHARGE IN PART—Filed June 9, 1923

Whereas, application has been made by Samuel Freshman, the bankrupt, for a discharge herein, and a specification of objections has been filed to a discharge by W. S. Atkins and such specification has been referred to E. M. Baker, Esq., as special master, to ascertain and report the facts with his opinion, and such special master has reported and recommended that such specification be overruled and that the discharge applied for be granted;

Whereas, the record, including the findings and recommendations of said special master, has been duly presented to this court, Messrs. Etheridge, McCormick & Bromberg and Paul Carrington having appeared in support thereof, on behalf of the bankrupt, and there having been no appearance in opposition;

Whereas, following such presentation the court has duly considered such record and has concluded for the reasons presented in a [fol. 32] written opinion filed herewith, that the discharge should be granted in part and denied in part,

It is ordered that the application of the bankrupt for a discharge herein is denied insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause No. 1211 in Bankruptcy, on the docket of this court, in which proceedings the bankrupt herein was adjudicated a bankrupt, but that as to creditors listed in the petition filed in these proceedings who were not listed in the earlier proceedings aforesaid, the discharge prayed for is granted, to which action of the court the bankrupt, by attorney, excepted.

(Signed) Wm. H. Atwell, District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

OPINION—Filed June 9, 1923

In cause number 1211, bankruptcy, the same bankrupt filed a voluntary proceeding. In due time he applied for his discharge. His discharge was contested. Considerable testimony was taken upon this issue but before a recommendation was made by the referee to the district judge, the referee died, and the proceedings passed to his successor who, after having reviewed the record, concluded that it should be recommended that the discharge be not granted. Ac- [fol. 33] cordingly the referee recommended to the court. This recommendation was never acted upon and it is still open for action by the court.

Those proceedings were instituted some time in 1914 or 1915.

On November 11th, 1922, the present case, number 1814, voluntary, was filed by the bankrupt. All of the creditors included in the first application are likewise creditors in this application. There are also some other creditors. A contest was filed to the application for discharge which was seasonably filed by the bankrupt in the instant case. The referee, in passing upon such contest, overruled the exceptions and demurrers to its sufficiency and heard testimony. Such testimony being almost entirely that of the bankrupt. After such hearing referee concluded that he could not legally deny a recommendation that the discharge be granted and cited, Bluthenthal vs. Jones, 208 U. S. 64; and, in re Elkind, 175 Fed. 64, as authorizing and supporting his action.

This court judicially knows, even though it has no actual knowledge, that this same bankrupt has an application pending in this court for discharge, from practically the same debts and creditors that are scheduled in the present proceeding, and that, however, such discharge was recommended against by the referee, he has not pressed a hearing on such application but has allowed the years to run by and is now seeking through another proceeding the same thing that he was compelled to seek in the first proceeding, if he should have relief.

[fol. 34] The evidence submitted to the referee in the first proceeding satisfied that officer that the bankrupt had been guilty of such infractions as rendered it unjust to allow him to have the benefit of the relief afforded by this act of Congress. Because there was no formal denial of the discharge by the district court it is contended that there could be no res adjudicata.

The phrase, res adjudicata, as ordinarily understood and defined by the courts means an adjudication; a former judgment; a definite hearing and determination.

This does not seem to be the significance that the bankrupt courts have been giving to the phrase. Circuit Judge Sanborn, speaking for the Circuit Court of Appeals for the eighth circuit in Kuntz vs. Young, 131 Fed. 719, held that when the bankrupt failed to apply for his discharge within the 12 months prescribed by the law that his failure to do so charged him with a judgment against him which

was res adjudicata and would prevent his discharge from the same debts in a subsequent proceeding.

The distinguished jurist said:

"The failure of the bankrupt to apply for a discharge from his debts in the involuntary proceeding within 12 months after the adjudication foreclosed his right to such a discharge. It is only within that time that he may, under the bankruptcy law, make a lawful application to be relieved from his debts. The record of his [fol. 35] failure to make the application in that proceeding was, in effect, a judgment by default in favor of his creditors to the effect that he was not entitled to a discharge from their claims. A judgment by default renders the issue as conclusively res adjudicata as a judgment upon a trial. The result is that the question whether or not the bankrupt was entitled to be discharged from the claims of the creditors scheduled and provable in the involuntary proceeding was conclusively determined in an action between them and the bankrupt by the record of his failure to apply for a discharge in that proceeding. But the parties to the voluntary were the same as to the involuntary proceeding, for Kuntz scheduled the same claims and creditors, and the trustee who objected to his discharge was the legal representative of the latter. The bankrupt's application for a discharge in the voluntary proceeding presented the same issue which had been conclusively determined against him in the involuntary proceeding, and there was no error in the refusal of the court below to reverse the former judgment and grant the application."

This case was followed by District Judge Lanning in 133 Fed. 1,000, in re Weintraub.

Circuit Judge Ward, speaking for the court of appeals for the second circuit In re Elkind, 175 Fed. 64, held, in substance, that the statute meant what it said, when it referred to the application for [fol. 36] discharge within the year and that such application having been made, and dismissed for a technical error, was sufficient to authorize the making of a subsequent application, even though such subsequent application was more than 12 months after adjudication. In the course of the opinion he says:

"An examination of the record in the earlier proceedings shows that no order was ever entered upon the memorandum of the district judge, so that the question is not res adjudicata."

This expression would seem to be dictum.

In the present case the bankrupt has seen fit to ignore his first proceeding. Perhaps he was convinced that a pursuit thereof would result in an order denying his discharge. At any rate he has permitted the case to go unhastened and after the lapse of seven or

eight years seeks, by another proceeding, to do what he failed to accomplish in the first proceeding.

In re Cooper 236 Fed. 298;
In re Kuffler, 153 Fed. 667, affirmed, 168 Fed. 1021;
In re Silverman, 157 Fed. 675;
In re Elvy, 157 Fed. 935;
In re Pullian, 171 Fed. 595;
In re Van Vorries, 168 Fed. 718.

I am unable to note any substantial difference between a failure to apply for a discharge within 12 months and a failure to prosecute [fol. 37] an application for a discharge after a referee shall have recommended against such a discharge. Of course, I, of course see the technical difference. But, there is no real difference. And while the right to a discharge is a valuable right, and while this right was the real purpose, doubtless that Congress had in mind, when it passed the bankrupt statute, still we may not disregard the fundamentals of equity jurisdiction and allow an applicant to feel out the temperament of the court, through its officers, and then abandon his pleadings and when time has changed the *personal* of referee and judge, re-enter the tribunal and seek the same relief that he could not get at a former time.

In re Stone, 172 Fed. 947.

As to the new creditors; that is, as to the creditors in the present petition who were not creditors in the first petition, there appears to be no just reason why he should not be discharged therefrom, but as to the creditors who were creditors in the first petition his application for a discharge is denied and an order will be drawn in accordance with this view.

Since dictating this opinion I have inspected the record in number 1211, the original bankruptcy, and have signed an order denying the discharge in that case.

(Signed) Wm. H. Atwell.

[File endorsement omitted.]

[fol. 38] IN UNITED STATES DISTRICT COURT

MOTION OF SAMUEL FRESHMAN, BANKRUPT, THAT ORDER GRANTING DISCHARGE IN PART AND DENYING DISCHARGE IN PART, ENTERED JUNE 9TH, 1923, BE RECONSIDERED AND VACATED, FOR A REHEARING AND ON SUCH REHEARING FOR ENTRY OF AN ORDER GRANTING DISCHARGE AS PRAYED FOR—Filed June 16, 1923

To Honorable William H. Atwell, judge of said court:

Now comes Samuel Freshman, bankrupt, and moves the court that its order of June 9th, 1923, granting a discharge in part and denying a discharge in part, be reconsidered and vacated, and that a

rehearing on the question of discharge be granted, and that upon such rehearing the court enter an order granting a discharge to the bankrupt as prayed for. As grounds for the said motion, the bankrupt represents:

1. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause No. 1211 in bankruptcy, because the specifications of objection filed by the objecting creditor were and are fatally defective and insufficient to raise any issue for determination by the court, the bankrupt therefore being entitled of right to his discharge as prayed for.

2. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause No. 1211 in bankruptcy, because the specifications of objection filed by the objecting creditor were and are wholly unsupported by any evidence.

[fol. 39] 3. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause No. 1211 in bankruptcy, because the specifications of objection filed by the objecting creditor were abandoned and waived, as shown by the record of the proceedings had before the special master, by the absence of exception and objection to the findings and recommendations of the special master and by the absence of appearance in this court of the objecting creditor, and of any attorney on his behalf.

4. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause No. 1211 in bankruptcy, because no objection or specification of objection was filed in this cause by or on behalf of any creditor, on the ground that, or averring that, the status of such former proceeding numbered 1211 precluded or in any way affected the granting of a discharge herein as prayed for.

5. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause No. 1211 in bankruptcy, because there is no showing in this record that there has ever been a final determination in the earlier proceeding numbered 1211 that the bankrupt is entitled or is not entitled to a discharge for any ground properly placed in issue in this cause, that is to say, such a final determination as may preclude or in any way affect the granting of a discharge herein as prayed for.

[fol. 40] 6. For the reasons above presented, we submit that the court erred in considering in any way as applicable to the issue presented in the record before it in this cause, the status of the earlier proceeding numbered 1211. Since, however, the court has in part denied a discharge based upon judicial knowledge of such earlier proceedings, without objection or specification of objection on

that ground and without evidence in the record to such effect, and since the references in the opinion of the court filed with its said order herein refers to such earlier proceeding, as we conceive, erroneously in some particulars, we submit to the court, to correct what we conceive to be a misapprehension of the status of the earlier proceeding, the following facts for the purpose of showing that in addition to the errors above presented, the court erred in considering the status of the earlier proceeding a ground for denying a discharge in part herein.

A. In the earlier proceeding the voluntary petition was filed in November, 1915. The application for discharge was filed in May, 1916. Objection and specification of objection on behalf of the Citizens State Bank & Trust Company and George T. Atkins were filed in August, 1916. The foregoing was referred to Hon. Eugene Marshall, then referee, as Special Master who heard evidence on the same, consisting solely of the testimony of the bankrupt and of the trustee in bankruptcy, but who never reached a final conclusion with reference to the same and never made findings or recommendations or filed the same with the court.

[fol. 41] B. More than a year after the conclusion of such hearings, the said Hon. Eugene Marshall died and was succeeded as referee by Hon. E. M. Baker. This matter was never referred to the new referee formally as a special master. The new referee had no hearings on the matter and no witnesses testifying before him. For about two years after the appointment of the new referee, the record in the matter appeared to have been lost and no action was taken. In January, 1921, the record was found including an unsigned and unauthenticated memorandum purported to have been dictated by the former referee which tended to show that the former referee intended to recommend that a discharge be denied. Based solely upon a reading of this memorandum and a reading of the stenographic notes of the testimony taken before the former referee, Hon. E. M. Baker recommended that the discharge be denied on January 28th, 1921.

C. The bankrupt and his attorney, Mr. J. H. Synnott, had in every way possible sought to hasten the final determination of the question by the former referee and repeatedly made inquiries of the new referee concerning the status of the matter; they were finally told that because of the inability to find the former records, the new referee expected to recommend that a discharge be granted, from which advice they thought the matter closed unless and until they received [fol. 42] further notice. In June, 1922, immediately upon learning of the recommendation of the Hon. E. M. Baker, the bankrupt filed exceptions and objections thereto and moved that a discharge be granted or, in the alternative, that the matter be again referred to a special master. No further action having been taken until the court, on its own motion on June 9th, 1923, considered the record and ordered that the discharge be denied without notice to the bankrupt or his attorneys, they immediately upon learning of such action,

have excepted thereto and have renewed their said objections and exceptions and said motion as grounds for a rehearing of the matter by the court. Neither the bankrupt, nor any one for him, has delayed or attempted to delay a determination of the matter.

D. Long before June 9th, 1923, the objection and the specification of objection filed in August, 1916, were abandoned and waived. Insofar as the bankrupt knows, no affirmative action by or on behalf of the Citizens State Bank & Trust Company and George T. Atkins, or either of them, or their attorneys, has been taken in such proceeding since the hearing of the contest before the Hon. Eugene Marshall on February 1st, 1917, and on information and belief, the bankrupt avers that no affirnative action by or on behalf of them or any of them, has been taken since that date. The said creditors are not now existent and have not existed for a long time, the said [fol. 43] George T. Atkins having been long since dead and the Citizens State Bank & Trust Company, which was a banking corporation of Dallas, Texas, having long since discontinued business and been dissolved; the firm of attorneys representing such creditors has long since been dissolved.

7. Affidavits in support hereof are attached hereto.

Respectfully submitted, (Signed) Etheridge, McCormick & Bromberg, Paul Carrington, Attorneys for Samuel Freshman, Bankrupt.

[File endorsement omitted.]

AFFIDAVIT OF J. H. SYNNOTT ATTACHED TO SUCH MOTION

STATE OF TEXAS,
County of Dallas:

Before me, the subscribed authority, on this day personally appeared J. H. Synnott, to me well known, who, being first duly sworn, on his oath says:

In November, 1915, I filed as the attorney for Samuel Freshman his voluntary petition in bankruptcy in the District Court of the United States for the Northern District of Texas at Dallas; and on May 12, 1916, I filed for him, he having been adjudicated a bankrupt meanwhile, his application for discharge. Notice of opposition to the application having been filed on August 25, 1916, by Irish & Thornton as attorneys for the Citizens State Bank & Trust Com- [fol. 44] pany and George T. Atkins and specifications thereon filed on the 26th day of August, 1916, on their behalf, a hearing on such instruments, they having been referred to the Honorable Eugene Marshall, Esquire, came on to be heard before such special master on February 1, 1917. Testimony of the bankrupt and Julian Runge, trustee, was introduced on behalf of the objecting

creditors, but the books of the bankrupt which had been delivered to and were then in the custody of the trustee were not introduced in evidence.

Several times during the next year I called upon the Honorable Eugene Marshall urging that he perfect his record on the issues presented by such instruments and by such testimony, but the said master seemed undecided. On or about February 1, 1917, the said master had dictated a memorandum in which he expressed a conclusion that the discharge should be denied; the memorandum, however, was not signed by the master and in conversation with me, the master promised that he would advise me when he was ready to make up his record. The master agreed that when he finally made up his findings and conclusions he would call the attorneys for the creditors and me before him and allow all to be heard as to the form of his report and would consider their exceptions and would give all a chance to file formal exceptions to the report. In the month of ——, 1918, the said Eugene Marshall died, he not having, theretofore, called the lawyers before him as he had agreed to do. Insofar as I know the master had never taken any further action or cognizance of the case.

[fol. 45] The Honorable E. M. Baker being appointed Referee in Bankruptcy to succeed the deceased Honorable Eugene Marshall, I soon called at the office of the new Referee and asked for information concerning the status of this matter. At that time the record of the proceedings had before the former Referee could not be found. On one or more other occasions I conferred with the new Referee and on each of these occasions it was reported that the record in the case had been lost.

From the date of the instrument signed by Honorable E. M. Baker, the new Referee, January 28, 1921, it appears that the record, including the memorandum dictated on February 1, 1917, under the circumstances above stated, must have been then found. I was given no notice of the finding of the record, nor was I given any notice of the signing of the said instrument by the Honorable E. M. Baker on January 28, 1921, nor was I given any notice of the filing thereof, together with the return of the papers above described and the record of the testimony taken, in the office of the District Clerk immediately thereafter; Mr. Freshman, my client, was not given notice of any of these things. I did not learn nor did my client for more than a year thereafter that the record had been found nor that any recommendation or purported recommendation had been made. As soon as I discovered this I filed the objections and exceptions and motion containing the instrument filed by me with the District Clerk on June 7, 1922.

[fol. 46] Long before January 28, 1921, the firm of Irish & Thornton had been dissolved and Mr. Thornton, who had been looking after this matter for the objecting creditors, had been elected and served a term as Judge of the County Court of Dallas County at Law No. 2. In so far as I know neither Mr. Thornton nor Mr. Irish, nor the creditors for whom they were acting nor any of them,

took any affirmative action in these proceedings since the first day of February, 1917; and on information and belief I state that they took no such action. Long prior to January 28, 1921, the Citizens State Bank & Trust Company had dissolved, and George T. Atkins, the other objecting creditor, I understand, had died.

I have at no time taken any action in these proceedings on behalf of Mr. Freshman, nor has he taken any action for the purpose of or which tended to postpone or delay a consideration of these proceedings. I hastened in every way that I could a hearing before the Honorable Eugene Marshall and urged him repeatedly to reach his final conclusions and to file a final recommendation and report.

Upon the succession of the Honorable E. M. Baker as Referee, I made inquiries concerning the matter as aforesaid, and on the last occasion of making such inquiries was advised that in the absence of the record of the proceedings had before the Honorable Eugene Marshall, the Honorable E. M. Baker intended and expected to recommend to the court that the discharge be granted. After receiving such advice I assumed that in due course a recommendation that the [fol. 47] discharge be granted would be filed with the court and in due course presented. I was surprised to learn in June, 1922, that a contrary recommendation had been made.

The exceptions and motion which I filed on June 7, 1922, presented as forcifully as could the objections which I made to the entry of an order denying a discharge. An order denying a discharge having been entered on June 9, 1923, without my having had an opportunity to present such objections to the court or to except to the action of the court, I have renewed all of said objections as well as having made others by a motion that the court re-open and hear the question of discharge, etc., filed on June 15, 1923, a true copy of which is hereto attached, which is still pending in said cause and on which I am insisting, which said motion incorporates bodily the motion and exceptions which I filed on June 7, 1922.

(Signed) J. H. Synnott.

Sworn to and subscribed before me on this 15th day of June, A. D. 1923. (Signed) J. E. Synnott, Notary Public in and for Dallas County, Texas. (Seal.)

Copy of Motion Filed in Cause Styled "In the Matter of Samuel Freshman, Bankrupt, No. 1211, in Bankruptcy," as Attached to the Foregoing Affidavit of J. H. Synnott

To the honorable the judges of said court:

[fol. 48] Samuel Freshman, bankrupt in the above numbered and entitled cause, by his attorney of record, excepts to the order of the Court entered herein on June 9, 1923, denying a discharge and moves the Court to reopen and rehear the question of discharge, and in so doing that it enter an order granting the bankrupt his discharge,

or, in the alternative, that the application for discharge with objections and specifications of objection thereto, be referred to a Special Master for determination, and as grounds for the said motion shows the Court:

I

Despite the exceptions of the bankrupt and his motion filed herein on June 7, 1922, which had never been acted upon, the court of its own motion and without notice to the bankrupt or his attorney of record took under consideration on June 9, 1923, the purported recommendation of Honorable E. M. Baker, Referee in Bankruptcy, dated January 28, 1921, that the application of the bankrupt for a discharge herein be denied, and on that date entered an order denying such discharge without affording the bankrupt or his attorney an opportunity to present either the exceptions of the bankrupt or his motion referred to, or to present argument or to except to the action of the court. This action of the court having accidently come to the attention of the attorney of record for the bankrupt on June 13, 1923, the said attorney has immediately prepared and filed this instrument and hereby as promptly as possible takes exception to such action of the court.

[fol. 49] II

The bankrupt by his attorney of record renews the exceptions made to the purported report of the Honorable E. M. Baker, above referred to, made in the said instrument filed June 7, 1922, a copy of which is attached hereto as Exhibit "A" and made a part hereof as completely as if set out in full, and excepts to the action of the court referred to for the reasons that exceptions were taken to the said purported action of the Honorable E. M. Baker.

III

The bankrupt by his attorney of record, renews the motion that the discharge herein applied for be granted, or, in the alternative, that the application for discharge be referred to a Special Master for the taking of testimony and filing of a report as required by law, contained in the instrument filed June 7, 1922, which said instrument is attached hereto as Exhibit "A" and incorporated as completely as if set out in full, and presents here as reasons for a rehearing and a determination in favor of the bankrupt on such rehearing, the reasons set forth in such instrument.

IV

The bankrupt avers and represents that before June 9, 1923, the objections filed to his discharge on August 25, 1916, by Irish & Thornton, as attorneys for the Citizens State Bank & Trust Company [fol. 50] and George T. Atkins, and the specifications of objection filed by said attorneys on behalf of said creditors on August 26, 1916,

were long since abandoned and waived. In so far as the bankrupt knows no affirmative action by or on behalf of the said creditors or these attorneys has been taken in these proceedings since the hearing of the contest thereon before the Honorable Eugene Marshall, Esquire, on February 1, 1917, and on information and belief, the bankrupt avers that no affirmative action by order on behalf of them or any of them, has been taken since that date. The said creditors are not now existent, the said George T. Atkins having long since been dead, and the Citizens State Bank & Trust Company, which was a banking corporation of Dallas, Texas, having long since discontinued business and dissolved; the firm of attorneys representing such creditors has long since dissolved. No affirmative action having been taken by or on behalf of such creditors or on behalf of any other creditor to hasten a determination of this contest to a discharge, and no final determination having as a result been made for a period of more than six years, the objections to the discharge as prayed for herein and the specifications of objection were abandoned and waived, and the court erred, for that reason, in denying a discharge herein.

Respectfully submitted, (Signed) J. H. Synnott, Attorney of Record for Samuel Freshman, Bankrupt.

[fol. 51] Exhibit A Attached to Said Motion, Being Copy of Instrument—Filed June 7, 1922

Now comes Samuel Freshman, the bankrupt in the above entitled and numbered cause and excepts to the report of Honorable E. M. Baker, and the recommendation filed by the Honorable E. M. Baker, herein, recommending the refusal of the discharge of the bankrupt, and moves the court either to ignore the same and grant the discharge herein applied for, or refer this application for discharge again for taking testimony and filing a report as required by law, for the reason that the same was never referred to the Honorable E. M. Baker, and because the referee who heard the evidence, never filed any report or recommendation or findings of facts as required by law.

History of Proceedings

On the 12th day of May, 1916, the bankrupt filed herein in due form of law, his application for discharge. On the 25th day of August, 1916, Irish and Thornton, as attorneys for the Citizens State Bank and Trust Co., and Geo. T. Atkins, filed notice of opposition to the application for discharge. On the 6th day of August, 1916, specifications of objection were filed by Geo. T. Atkins and M. E. Martin, Vice President of the Citizens State Bank and Trust Co. The only specification was as follows: For the reason that with intent to conceal his true financial condition, he has failed to keep books of account or records, and has destroyed books

[fol. 52] of accounts or records, from which such financial condition might be ascertained. About the 1st of February, 1917, this application for discharge, together with specifications of objections, came on to be heard before the Honorable Eugene Marshall, Esq., Referee in Bankruptcy, to whom the same had been referred. At such hearing, Julius Runge, Trustee, was called as a witness, but his depositions were never reduced to writing and signed or sworn to by him. The bankrupt, Samuel Freshman was examined and his depositions were sworn to before the Referee on the 12th of February, 1916. Apparently at the conclusion of the hearing, the Referee dictated his opinion as to the merits of the application for discharge. He also stated in that dictation that he admitted in evidence, the depositions taken at the first meeting of the creditors. This indorsed Referee's memorandum was never signed by him or filed by him, and can have no place in this record whatever. As a matter of fact, at the conclusion of this hearing, and several times thereafter, in conference with the attorney for the bankrupt, he stated that when he went to make up his findings and conclusions, he would call the lawyers before him, including the attorney for the bankrupt, and allow them to be heard as to the form of report, and consider their exceptions and give them a chance to file exceptions to his report. The lamented Referee lived several years thereafter, or at least quite a while thereafter and never took any further action in or cognizance of the case. Years later, the Honorable E. M. Baker was appointed Referee in the place of the Honorable Eugene Marshall, deceased, and conferred with the bankrupt's attorney a number of times, al-[fol. 53] ways reporting that the record in the case had been lost. It appears that about the 28th day of January, 1921, the Honorable E. M. Baker found the papers in the case, that is found the supposed testimony taken on the hearing of the application for discharge, and the testimony taken at the first meeting of the creditors, and an unsigned memorandum of the Honorable Eugene Marshall, Referee as hereinbefore referred to. I presume that this record was then transmitted to the clerk, at least, on the 28th day of January, 1921, the Honorable E. M. Baker entered an order recommending that the discharge be not granted. The attorney for the bankrupt did not learn for a year thereafter that the record had been found or that any recommendation had actually been made.

Authorities

Collier on Bankruptcy, page 361: The Referee being denied jurisdiction to determine discharges, reference to him, not as Referee, but as Special Master in Chancery to hear and report on the facts was quite universal. From In re Randall, 159 Fed. Rep. 298, and International Harvester Co. v. Carlson, 217 Fed. Rep. 736, we gather ample authority that a Referee as such has no jurisdiction over a contest. In re Murray, 160 Fed. Rep. 983, it is held that the Special Master should not base a finding upon the original examination of the bankrupt before him as Referee. From Collier on Bankruptcy, page 365, I quote the following: At the conclusion of the reference,

the Special Master makes up a report and files it with his record and [fol. 54] all papers and pleadings with the clerk. Such report should embody a summary of his findings and state his opinion thereon. He should present his own judgments on the facts.

Remarks

The Honorable E. M. Baker, as Referee in Bankruptcy, had no jurisdiction whatever to render any services in the matter, unless the matter had been specially referred to him as Special Master. This court has no right to consider anything which occurred before the Honorable Eugene Marshall, as Special Master, until he filed herewith a report of his findings duly executed by him, together with the evidence upon which he based the same. Now the Honorable E. M. Baker, concludes because he found somewhere in the office of the Honorable Referee, a typewritten statement not signed by the Honorable Referee and not filed, that he can gather therefrom what the Honorable Referee intended to recommend, but failed to do so. I presume the theory upon which the Honorable E. M. Baker acted, was, that it could be shown that the undersigned statement was dictated by the Referee, the Honorable Eugene Marshall. That is probably correct, and in fact, we do not deny. That at the conclusion of the hearing, the Honorable Eugene Marshall delivered himself of an opinion about as the one found in the record, but the Honorable Master in Chancery had a right to change his mind. The fact that he held the record before him month after month, year after year, and never legally made any recommendations, and [fol. 55] the fact that he conferred with counsel time after time, and agreed to give counsel a hearing, when he finally went to make up his record, are proof positive that his mind was never fully made upon the record. There has therefore, never been, any report of the Master made in this case. Again, even if the undersigned paper had been signed by the Referee, that is by the Honorable Eugene Marshall, the record would still be insufficient. Before his acts were complete, he had to actually file the record with this court. He never did so. He never even had the witnesses swear to their testimony. He did not die suddenly so as to prevent it, but he retained the matter in his hands month after month as an indication that his mind was not made up. Again the record as it is found, even though all the papers had been signed, do not constitute such a report of the Special Master as would give the court jurisdiction to pass upon the application. It does not include any findings of fact or conclusions of law such as objections can be filed to. It consists mostly of testimony taken at the first meeting of the creditors, which constitutes no part of the record.

Wherefore the bankrupt prays the court either to refer this application for discharge to another Master in Chancery to proceed upon as originally, or disregard the same and grant the application for discharge as prayed for.

[fol. 56] II

And now comes the bankrupt and objects to the report of the Special Master in Chancery herein, recommending that his application for discharge be refused, for the reason that there is no sufficient evidence upon which to base the same, and because the evidence, taken all together, does not prove even by preponderance of the evidence or establish either of the objections or specifications of objection filed by the objecting creditors.

Statement

The specification of objection is as follows: For the reason that with intent to conceal his true financial condition, he has failed to keep books of account or records, and has destroyed books of account or records, from which such financial condition might be ascertained.

Among the unsigned and unfiled papers in this record, is what purports to be a deposition of Julius Runge. This, together with the depositions of the bankrupt himself, constitutes all the alleged testimony upon the hearing. In this deposition of Runge, he testifies that he is the receiver and trustee in the case. He said he found the books very confusing. The only books that were turned over were some books, showing daily sale, and a journal and a ledger, but that it was difficult for him to find out what Freshman was paying for expenses, and what he had paid to Rudberg for rent and to the porter, and that he could not learn from the books the [fol. 57] bankrupt's financial condition. He testified further that the estate would pay nothing to common creditors. That is all of Runge's testimony, even if it were signed and could be considered in the case.

Freshman was called to the stand by the opposing creditors. At the beginning of this testimony, it was shown that the books were in the custody of the trustee and not in the control of the bankrupt. Freshman testified that he kept part of his books, and that once in a while he had them examined by a bookkeeper. He testified further that he did not know his financial condition until he conferred with counsel a short time before filing the petition in bankruptcy. He said he did not keep any proper books, but that is the way all liquor dealers keep books. He testified that he kept his account with the bank by referring to his check book and pass book; that as to accounts owed merchants, he kept a memorandum that he could understand, and that he kept the invoices and from that he could generally find out how he stood with the merchants. He testified further that he could not tell from the books what assets he had on hand. He testified that he only dealt principally with two houses. He stated that in 1915, he bought some property out of town, and began to sell his notes to raise cash. He said that in that time he was in pretty good shape. He stated on page 15 that to pay the first notes issued, he would sell new notes, and

with that money pay the old notes. He stated on page 15 that he did not keep a record of the notes which he issued to White and which White sold. The only thing he kept was a check book. On [fol. 58] page 18 he said he never had any special agreement with White, that he merely told White that he had this or that debt to meet and needed the money, and thereupon, White would go sell his notes, and give him part of the money. He said some of this money went to White, some went to pay debts, and some went to buy property for his minor son. The only testimony as to why he never kept these books was his answer to questions to the effect that he had no partner, that he had nobody to divide up with, and it was not therefore essential to keep any record except that record which he in fact, did keep, that is he had a record of everything he owed for merchandise, and what he owed the bank, and it was not necessary for him to know at any particular time what assets he had on hand. As to the notes which he issued to White and which White sold, he explained that that was not a complicated matter, that he would issue one note to White and White would go sell that, and later on, he would sell another note and get money to pay off the first note, so that there there were never so very many of these notes outstanding at any one time. On cross examination he testified that he began business in Dallas, in 1883, in the retail liquor business, and that he did not keep any books at all. The court excluded this testimony, but I feel sure the court ought to consider it as legitimate evidence upon the issue of why he failed to keep books, if he so failed. He stated that he had a bookkeeper for the purpose of keeping the revenue books, but for no other purpose. He testified that he never did keep a bills payable account. He testified [fol. 59] on page 37 that there was never a time when he was in business, that one could go to his books and find out what notes he had outstanding. He said that the reason was he never had anyone to divide up with. He was always sole owner, and therefore, never saw any necessity of keeping books. He stated that he kept small books in which he always wrote down daily receipts and what he paid out during the day. This went back ten or fifteen years and those books were then in court. That is about all there is in the record as to why he failed to keep books, and what books he did keep, and what books he did not keep. We contend that the deposition taken at the first meeting of the creditors is no part of this record. However, if you go to consider it, you will find that it carries out about the same idea, that during all the time Freshman was in business, he kept a crude lot of books from which he could tell in a general way what he did each day. He could tell from his books generally what he owed various parties from whom he had bought merchandise, what he had in the bank and what he owed the bank, but he could never tell from his books what property he had on hand in the way of merchandise. He would have to take an inventory to prove that. Also that he never did keep a set of books showing what he owed people on notes. As a matter of fact, he never did owe many people on notes, until about 1913, when he began to

speculate in land, he got to where he needed more money than he had. The first thing he did was to give a note for several thousand dollars to Oral C. White, and asked him to go and see if he could [fol. 60] cash it for Freshman. At that time, Freshman stood by reputation, as quite a wealthy man, and there was no trouble much to cash his note. This first note was cashed by White and he retained part of the proceeds and returned part of the proceeds to Freshman. Pretty soon, Freshman, either to pay that note or to pay other indebtedness, he needed more money, and he gave another note to White, and White went and cashed that and returned part of the proceeds to Freshman. This went on over a period of a great many months and it is stated by the counsel for the trustee that they all total some Thirty Thousand Dollars ($30,000.00). There is nothing else in the record to indicate that but a mere statement of counsel as I recall. The facts are however, that the amounts of these notes did run up to a considerable total. The amount of them did not represent, however, the amount of new money obtained by Freshman. It merely meant the amount of notes which Freshman cashed, either to pay off former notes or other debts, or make investments. This is all there is as to the testimony in the case.

Authorities

Collier on Bankruptcy, last edition, page 381. In re Blalock 118 Fed. Rep. 679. In re Keefer 135 Fed. 885. In re Brockman 168 Fed. 1015. In re Brown 199 Fed. 356. In re Rivas 268 Fed. 690. In re Croonborg 268 Fed. 352.

[fol. 61] Argument

Under all the authorities, to prevent a discharge for either of the grounds urged by the objecting creditors, the burden is upon the creditors to prove by clear and convincing evidence, not only that the bankrupt failed to keep books of account, but that he did it for the purpose of concealing his financial condition. Also all the authorities established the proposition that the intent to conceal will not be presumed from the mere failure to keep the books. There is nothing whatever in this record to show any intent to conceal his condition on the part of Freshman. The case has been conducted all the way through on the theory that all the objecting creditors had to do was to prove a failure to keep a perfect set of books. There has been no effort whatever to prove any wrongful intent. The record briefly shows that Sam Freshman had always been in business for himself. He had never had any partner. He kept little memorandum of daily transactions, he kept books that showed what he owed the bank, and what money he had in the bank, he kept books and invoices that showed what he owed other people, but he never did keep accurate inventory of sales or of stock purchased. Again he did not keep accurate record of the notes which he issued to other people, besides

the bank. He thought however, he could always keep knowledge of them in his mind. The great complaint seems to be against this bankrupt on account of his transactions with Oral C. White. Many years before his bankruptcy, Oral C. White induced Sam Freshman to buy what was represented to be oil land in Palo Pinto County. [fol. 62] When Freshman got short of money, he suggested the fact to White and asked White if he, White, could get the cash on a note of Freshman's. Freshman then had a fine reputation and therefore White could obtain the money on Freshman's note. Thereupon, Freshman gave White the note and White went and cashed it. As other payments for the land fell due, he gave White other notes which White went and cashed. As those notes came due and Freshman was not able to meet them, he gave other notes in renewal thereof. It is claimed by the attorneys for the objecting creditors, but no proof made thereof, that all these notes, original and renewal, amounted to Twenty or Thirty Thousand Dollars. Freshman says that he merely used this money to pay for this land, take care of his indebtedness, and to operate his business. He says he did not keep any accurate record of how many of these notes he had issued. It is this transaction alone that seems to have been the basis for the contention that he failed to keep books of account for the express purpose of concealing his financial condition. It is very evident that at the time he issued the first of these notes, and all of the original ones, and all of the notes except those issued to renew old notes, he was in a good financial condition, and so considered by himself and everybody else. However, it is claimed that this proof is sufficient from which to infer intent. The law says, however, that you cannot presume the intent from the mere failure. That is all however, that has been done or contended for in this case. The writer is of the opinion that every man who is in business alone could be [fol. 63] denied a discharge if Freshman can. The writer is of the opinion that no man, or at least none of the average of us who have no partners, keep any accurate records of our transactions. It will be contended that the law requires it and that we ought to do it. This is not so. The law permits us to fail to keep records just as much as we please, except that we must not fail with intent to conceal our financial condition. Freshman is an unlearned man as shown by the records. I dare say all the unlearned men who have started in business and by hard work climbed to success, have kept about the kind of books that Freshman kept. Freshman tells you that he did employ a man to keep his records for income purposes, and that so far as income purposes were concerned, he has never had any trouble with his books. It is apparent therefore that for all purposes which he understood it to be necessary to keep books, he kept them as the average man would have kept them. We respectfully submit that there is no evidence to support a denial of the discharge in this case. The law requires such proof to be clear and convincing, even if not beyond reasonable doubt.

Wherefore the bankrupt prays that his discharge be granted, or in the alternative that his application be referred to another Master,

with instructions to take testimony and report, and for such other and further relief as he may be entitled to.

J. H. Synnott, Atty. for the Bankrupt, Samuel Freshman.

[fol. 64] AFFIDAVIT OF L. C. MAYNARD ATTACHED TO SAID MOTION

STATE OF TEXAS,
County of Dallas, ss:

On this day personally appeared before me Louis C. Maynard, and being first duly sworn on oath, says:

My name is Louis C. Maynard, and I have been Clerk of the District Court of the United States for the Northern District of Texas since May 19, 1906.

There was filed in the Clerk's office, by Messrs. Synnott & Penry, attorneys at law, on Nov. 1, 1915, a voluntary petition for Samuel Freshman, same being docketed as No. 1211 in bankruptcy. May 12, 1916, an application was filed by the same Freshman for discharge, which was referred under the rulings to the Referee in Bankruptcy, at that time Eugene Marshall of Dallas, Texas. On August 25, 1916, the Citizens State Bank & Trust Company and George T. Atkins, by Irish & Thornton, their attorneys, filed notice of opposition to the application for discharge, and on August 26, 1916,specifications of objections were filed on behalf of said creditors, the only specification being:

"For the reason that with intent to conceal his true financial condition, he failed to keep books of account or records and has destroyed books of account or records, from which source his financial condition might be ascertained."

said objections and specifications being referred under the rules to Eugene Marshall, Esq., Referee in Bankruptcy.

[fol. 65] On or about January 28, 1921, the Referee's report, together with records of testimony taken before the Referee, were returned to my office by E. M. Baker, Esq., Referee in Bankruptcy, with a recommendation as follows:

"To the Honorable Edward R. Meek, judge of the District Court of the Northern District of Texas:

"I have the honor of submitting herewith a memorandum by the late Eugene Marshall, deceased, Referee in Bankruptcy, made in the matter on the first day of February, 1917. The lamented Referee, although he did not sign said report, indicates that he recommended the said bankrupt should not be discharged, and after reading the testimony taken in this matter and submitted herewith, I am of the opinion that under Section 14 of the Bankruptcy Act, Clauses 2 and 3, that said bankrupt is not entitled to a discharge, and recommend that the application for discharge be denied.

Dated at Dallas, Texas, this 28th day of January, A. D. 1921.

(Signed) E. M. Baker, Referee in Bankruptcy."

Shortly after this report was filed in my office, I placed the same, acting on my own initiative in so doing, together with other certificates and reports from the Referee, before the Honorable Edward R. Meek, U. S. District Judge of the Northern District of Texas, but before same could be considered by him, he was called from Dallas, by the serious illness of his son, and was obliged to remain with him, [fol. 66] and did not return to Dallas until late in the fall of 1921.

During the winter of 1922 and up until the appointment of Honorable William H. Atwell, as an additional Judge for this District, the dockets and reports at Dallas were greatly congested, and it was impossible for the court to consider anything but the most urgent matters and cases, which were set down for trial at the request of one of the opposing parties. Neither of the parties interested in this cause has ever asked to have the same set down for hearing, and same, therefore, was not brought to the attention of the Court.

During the fall of 1922 Mr. Paul Carrington of the firm of Etheridge, McCormick & Bromberg, called at the Dallas office and looked through the record in Bankruptcy Cause No. 1211 and stated that he now represented Mr. Freshman and that he proposed to file a new voluntary petition in bankruptcy for him, and did so file a voluntary petition on November 11, 1922, numbered 1814, in which all the debts and claims originally scheduled in No. 1211 were again scheduled and thereafter filed an application for discharge in said cause, asking that he be discharged from all his debts including those scheduled in No. 1211.

Neither the bankrupt nor anyone on his behalf has attempted to effect a postponement of the presentation or consideration of the proceedings in relation to the discharge of Samuel Freshman save insofar as heretofore stated.

[fol. 67] On June 9, 1923, while the application for discharge in Cause No. 1814 was under consideration, the record relating to the application for discharge in Cause No. 1211 was delivered by me to Honorable William H. Atwell, United States District Judge, upon his request, and thereafter on June 9, the following order was made in Cause No. 1211:

"The recommendation of the Referee heretofore made on the 28th day of January, A. D., 1921, that the court deny a discharge to the bankrupt be, and the same is, hereby followed and such discharge is denied."

(Signed) Louis C. Maynard.

Subscribed and sworn to before me this the 16th day of June, 1923. (Signed) D. A. Campbell, Notary Public, Dallas County, Texas. (Seal.)

In United States District Court

Bill of Exceptions of Bankrupt No. I and Order Settling Same—Filed June 18, 1923

Be it remembered that at a regular term of the above styled court which convened on the 7th day of May, A. D., 1923, and is still in session on this 18th day of June, A. D., 1923, the following proceedings were had and the following bill of exceptions was taken by the bankrupt to the proceedings as hereinafter indicated:

The motion of Samuel Freshman, Bankrupt, that the order granting a discharge in part and denying a discharge in part entered June [fol. 68] 9th, 1923, be reconsidered and vacated for a rehearing, and on such rehearing for the entry of an order granting discharge as prayed for, duly came on to be heard on the 18th day of June, A. D., 1923, before the Hon. William H. Atwell, United States District Judge for the Northern District of Texas, at Dallas, and the bankrupt with his attorneys of record appeared in support thereof; there was no appearance in opposition.

The said motion having been considered by the court, the bankrupt offered to introduce in support thereof the testimony of J. H. Synnott and L. C. Maynard, their testimony to be identically that shown by their affidavits attached to and incorporated in the said motion, which proffered evidence the court refused to admit otherwise than in the form of such affidavits, which affidavits were then offered and admitted in evidence and considered by the court.

There was no other evidence introduced or offered on the said motion.

After argument of counsel, the court concluded that the said motion should be overruled and requested attorneys for the bankrupt to prepare an order to such effect.

The foregoing bill of exceptions is approved by the undersigned attorneys of record for the bankrupt.

(Signed) Etheridge, McCormick & Bromberg, Paul Carrington.

Dallas, Texas, June 18th, 1923.

[fol. 69] The foregoing bill of exceptions is approved and directed to be filed as a part of the record in this case, this 18th day of June, A. D., 1923.

(Signed) Wm. H. Atwell, United States District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION OF BANKRUPT THAT ORDER DENYING DISCHARGE IN PART AND GRANTING DISCHARGE IN PART, ENTERED JUNE 9TH, 1923, BE RECONSIDERED AND VACATED, FOR A REHEARING AND ON SUCH REHEARING FOR ENTRY OF AN ORDER GRANTING DISCHARGE AS PRAYED FOR—Filed June 8, 1923

On this 18th day of June, 1923, came on to be heard the motion of Samuel Freshman, bankrupt, that the order of this court entered June 9th, 1923, granting a discharge in part and denying a discharge in part, be reconsidered and vacated, for a rehearing, and on such rehearing, for the entry of an order granting a discharge as prayed for; there appeared in support of said motion the said bankrupt and his attorneys of record; there was no appearance in opposition.

Thereupon the motion having been read to the court, evidence having been proffered by the bankrupt and considered by the court, as shown by a bill of exceptions approved and filed herewith, and argument of counsel having been had, the court concluded that the said motion should be overruled.

[fol. 70] Therefore, said motion is hereby overruled, to which action the bankrupt excepted in open court and in open court gave notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit.

(Signed) Wm. H. Atwell, United States District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed June 18, 1923

Samuel Freshman, bankrupt, conceiving himself aggrieved by the order entered in the above numbered and entitled cause on June 9th, 1923, granting a discharge to him in part and denying a discharge in part, and by the order entered therein on June 18th, 1923, denying to him a rehearing, hereby appeals from said orders to the United States Circuit Court of Appeals for the Fifth Circuit, for the same reasons specified in the assignment of errors which is filed herewith, and prays his appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said orders were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit, prays that a citation may be granted, directed to W. S. Atkins, commanding him to appear before the United States Circuit Court of Appeals for the Fifth Circuit to do and receive that which may appertain to justice to be done in the [fol. 71] premises, and prays that the amount of an appeal bond herein be fixed in the premises.

(Signed) Etheridge, McCormick & Bromberg, Attorneys for Samuel Freshman, Appellant. Paul Carrington, Solicitor.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed June 18, 1923

Now at the time of his filing petition for appeal herein, and the allowance thereof, comes Samuel Freshman, bankrupt, and makes and files his assignment of errors as follows:

1. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause No. 1211 in bankruptcy, because the specifications of objections filed by the objecting creditor were and are fatally defective and insufficient to raise any issue for determination by the court, the bankrupt therefore being entitled of right to his discharge as prayed for.

2. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause No. 1211 in bankruptcy, because the [fol. 72] specifications of objection filed by the objecting creditor were and are wholly unsupported by any evidence.

3. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause No. 1211 in bankruptcy, because the specifications of objection filed by the objecting creditor were abandoned and waived, as shown by the record of the proceedings had before the special master, by the absence of exception and objection to the findings and recommendations of the special master and by the absence of appearance in this court of the objecting creditor, and of any attorney on his behalf.

4. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause No. 1211 in bankruptcy, because no objection or specification of objection was filed in this cause by or on behalf of any creditor, on the ground that, or averring that, the status of such former proceeding numbered 1211 precluded or in any way affected the granting of a discharge herein as prayed for.

5. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause No. 1211 in bankruptcy, because there [fol. 73] is no showing in this record that there has ever been a final determination in the earlier proceeding numbered 1211 that the bankrupt is entitled or is not entitled to a discharge for any ground properly placed in issue in this cause, that is to say, such a final determination as may preclude or in any way affect the granting of a discharge herein as prayed for.

6. The court erred in overruling the motion of the bankrupt for a rehearing of the order denying a discharge in part and in not granting a discharge herein as prayed for on such a rehearing, be-

cause the uncontroverted evidence proffered by the bankrupt on the hearing of such motion shows that there has been no final determination in the bankruptcy proceeding numbered 1211 in bankruptcy, whether this bankrupt is entitled or is not entitled to a discharge for any ground properly placed in issue in this cause, that is to say, no final determination such as may preclude or in any way affect the granting of a discharge herein as prayed for.

For which errors found in the record, and because of each of them, the bankrupt, now the appellant, prays for a reversal of the order of the District Court of the United States for the Northern District of Texas, at Dallas, entered in this cause on June 9th, 1923, granting a discharge in part and denying a discharge in part, and a [fol. 74] reversal of the order of such court entered in this cause on June 18th, 1923, denying a rehearing on such order, and prays that the United States Circuit Court of Appeals for the Fifth Circuit, upon consideration of the record herein, grant the appellant a complete and final discharge; appellant further prays for such other relief as he may be entitled to.

(Signed) Etheridge, McCormick & Bromberg, Attorneys for Samuel Freshman, Appellant. Paul Carrington, Solicitor.

[File endorsement omitted.]

[fol. 75] Bond on Appeal for $250—Approved and filed June 18, 1923; omitted in printing

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[fol. 76] In United States District Court

Order Allowing Appeal—Filed June 18, 1923

It is ordered that the appeal prayed for in the petition for appeal filed and presented to the court on this day on behalf of Samuel Freshman, bankrupt, in the above numbered and entitled cause, be and the same is hereby allowed as therein prayed for; that the [fol. 77] said appellant in effecting his appeal shall execute his bond with sureties to be approved by this court in the sum of two hundred fifty and no/100 dollars ($250.00), in terms as required by law; and that an appeal bond in the amount above required having been presented to the court executed by the said appellant with surety satisfactory to the court, in terms required by law, the said bond is hereby approved.

Ordered at Dallas, this 18th day of June, A. D. 1923.

(Signed) Wm. H. Atwell, United States District Judge.

[File endorsement omitted.]

ORDER RE TESTIMONY—Filed June 19, 1923

An appeal having been perfected on June 18th, 1923, from the orders of this court in the above numbered and entitled cause of June 9th and June 18th, respectively; Samuel Freshman, the bankrupt, having been represented in all proceedings herein but W. S. Atkins, the appellee, not having been represented in any of such proceedings; the testimony taken before the referee being small in amount comprising in question and answer form less than six typewritten pages and the form thereof seeming of importance to the [fol. 78] appellant; the appellant having requested, pursuant to Equity Rule No. 75, that the testimony in such question and answer form be preserved in the record on appeal and be not translated to narrative form, and such request appearing to the court proper, it is hereby, this 19th day of June A. D. 1923, so directed and so ordered.

(Signed) Wm. H. Atwell, United States District Judge.

[File endorsement omitted.]

[fol. 79] CITATION—In usual form, showing service on W. S. Atkins; filed June 20, 1923; omitted in printing

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IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed June 19, 1923

You are requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Fifth Circuit, pursuant to an appeal allowed in the above numbered and entitled cause on the 18th day of June A. D. 1923, and to include in such tran- [fol. 80] script of record the following and no other papers, to-wit:

1. Caption.
2. Petition of bankrupt for discharge.
3. Notice of objection to discharge.
4. Specifications of objection to discharge.
5. Exceptions and demurrers of bankrupt to objection and specifications of objection to discharge.
6. Certificate of proceedings had before Hon. E. M. Baker, including his findings and recommendations.
7. Order directing that testimony taken before Hon. E. M. Baker be preserved in question and answer form.
8. Order of June 9th, 1923, granting discharge in part and denying discharge in part.
9. Written opinion announced by the District Court at the time of the entry of said order.
10. Motion of bankrupt that order granting discharge in part and denying discharge in part be reconsidered and vacated, for a

rehearing and on such rehearing for entry of an order granting discharge as prayed for.

11. Bankrupt's bill of exceptions No. 1.

[fol. 81] 12. Order overruling motion of bankrupt that order of June 9, 1923, be reconsidered and vacated, for a rehearing and on such rehearing for entry of an order granting a discharge as prayed for.

13. Petition for appeal.

14. Assignment of errors.

15. Bond on appeal.

16. Order allowing appeal, determining amount of appeal bond and approving appeal bond.

17. Citation on appeal with return thereon.

18. Præcipe for transcript of record.

19. Certificate of clerk.

Respectfully requested, (Signed) Etheridge, McCormick & Bromberg, Attorneys for Samuel Freshman, Appellant. (Signed) Paul Carrington, Solicitor.

To the Hon. L. C. Maynard, Clerk of the District Court of the United States for the Northern District of Texas, at Dallas.

[File endorsement omitted.]

[fol. 82] IN UNITED STATES DISTRICT COURT

CERTIFICATE OF CLERK

I, Louis C. Maynard, clerk of the district court of the United States for the Northern District of Texas, do hereby certify that the above and foregoing pages numbered consecutively 1 to 81, contain a full and correct copy of the pleadings, instruments and papers of every character filed, and of the proceedings had, in cause number 1814 in bankruptcy, styled "In the Matter of Samuel Freshman, Bankrupt," in so far as same relate to the application for discharge of said Samuel Freshman, as the same appear of record and on file in my office at Dallas, Texas, all as requested in the præcipe for transcript of record as set forth on page 79 above.

Witness the seal of said district court of the United States, and the name of the clerk thereof, this 30th day of June, A. D. 1923.

Louis C. Maynard, Clerk, by (Signed) Mary Conger, Deputy.
(Seal.)

[fol. 83] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 4136

SAMUEL FRESHMAN

versus

W. S. ATKINS

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 7th, 1923

On this day this cause was called, and, after argument by Paul Carrington, Esq., for appellant, was submitted to the Court.

[fol. 84] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

Appeal from the District Court of the United States for the Northern District of Texas

Paul Carrington (H. L. Bromberg, Paul Carrington, and Etheridge, McCormick & Bromberg, on the brief), for Appellant.

No Brief on file for Appellee.

Before Walker and Bryan, Circuit Judges, and Grubb, District Judge

OPINION OF THE COURT—Filed November 27th, 1923

GRUBB, District Judge:

This is an appeal from an order of the District Court for the Northern District of Texas denying the Appellant, who was the bankrupt, his discharge. The Appellee was an objecting creditor, who, however, failed to sustain his specifications of objections by offering proof, and the referee reported in favor of the discharge. He also reported to the District Judge that the bankrupt had filed a former petition in 1915, listing some of the identical creditors and claims, and had applied for a discharge in that proceeding; that the former referee, who had acted as Master, had reported in the [fol. 85] former case adversely to the discharge; that his report had never been acted upon, and was still pending. The objecting creditor in this proceeding has filed no specification of objection based upon the pendency of the former application, and has offered no proof in support of such objection. The report of the referee, in this case, was against denying the bankrupt his discharge because

of his former application for discharge, under his first petition. The District Judge, differing with the referee, denied the bankrupt his discharge solely because of the pendency of his former application. He also denied the bankrupt a discharge in the first proceeding, as recommended by the referee upon the merits and upon the objections of the Appellee filed in that case. This appeal is taken from the denial of the bankrupt's discharge upon his second application.

The Appellant contends that the District Judge erred in entertaining an objection on this ground since (1) there was neither pleading nor proof to support it, and the Judge was without power to act on his own motion, and to take judicial notice of the pendency and status of the other cause pending in his court; and (2) that the status of the bankrupt's first application furnished no reason for denying his discharge.

It is true that there was no appropriate pleading to present the issue, and that no proof was formally tendered on the hearing, and that the Judge acted on his own knowledge of the record of the first case and of the identity of the bankrupt in each case (as to both of which facts there is no dispute), supplemented by the report of the referee which certified the pendency of the former application by the same bankrupt; the adverse report made by the former referee, in which he joined; and that final action upon the first application had never been taken.

(1) The first question is whether the Judge had jurisdiction to [fol. 86] act, no objecting creditor having raised the issue, and whether he could act on his knowledge of the records of his own court in another cause, when not formally put in evidence upon the hearing before the referee. Section 14 of the Bankruptcy Act of 1898 provides that "the Judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest at such time as will give the trustee or other party in interest a reasonable opportunity to be fully heard and investigate the merits of the application and discharge the applicant unless, etc.,". We think the language of Section 14 is sufficient to vest in the District Judge authority to "investigate the merits of the application" of his own motion and in the absence of pleading filed by an objecting creditor raising the issue and that General Order XXXII prescribing the procedure to be taken upon the hearing of specifications of objecting creditors, does not preclude the District Judge from taking independent action upon his own initiative. His duty is both to hear "such proofs and pleas as may be made in opposition thereto by the trustee or parties in interest", and to "investigate the merits of the application and discharge the applicant" unless legal cause against it exists.

We also think that no formal tender of proof is necessary, provided that District Judge is judicially informed of the facts he relies upon. If he acts in the absence of evidence offered upon the hearing, his action is only to be justified when he acts upon matters of record

in his court or upon admitted facts. In the present case he acted both upon his knowledge of the record of the former case in his own court, and upon the report of the referee to him of the fact of its pendency, its status, and of the identity of the bankrupt in each of the two cases.

(2) The second question is whether the pendency of the first [fol. 87] application by the bankrupt for his discharge, undisposed of, when the District Judge came to pass upon the second application judtified the denial of the discharge, under the second application, as to debts scheduled under both.

The bankrupt had a full hearing before the referee upon the first application. The referee had reported the matter to the District Judge in 1915 and no disposition of the report had been made up to November, 1922, when the bankrupt filed a second voluntary petition, nor when his second application for a discharge was made under it. As to the debts common to both petitions, final action under the first, whether the discharge was granted or denied, would be conclusive of the second. The filing of a second application by the same party for the identical relief while another was still pending in the same court, would constitute an abuse of the process of the court, which the District Judge would have the right to redress by denying a discharge upon the ground of the pendency of the first application. If the bankrupt had the right to apply repeatedly under voluntary petitions, successively filed by him, for a discharge, and if the District Judge was required to grant each application, if no party in interest appeared and filed objections, even though he knew of the pendency of the former applications, it would result that the bankrupt would eventually obtain his discharge by wearing out objecting creditors by means of such repeated applications. The District Judge, being disabled from acting on his own motion and unable to act on his knowledge of facts that would disentitle the bankrupt to a discharge, would, if Appellant's contention is correct, be powerless to prevent this evil. The bankrupt could suffer no injury from a denial of a discharge in the second proceeding, as to debts scheduled in the first, having left him a full opportunity to obtain his discharge as to such debts under his first application. Having that opportunity, he lost nothing by what was in effect the [fol. 88] dismissal without prejudice of his second application. The District Judge has since denied him a discharge under the first application upon the merits. It is open to him to appeal from that denial, and upon such appeal, present in this court the identical questions as to his right to a discharge from debts scheduled in both petitions, as he would have under the present appeal. He was granted a discharge in this case from all debts scheduled under the second petition only. If a discharge had been granted him as to the common debts, under the second application, and denied as to the same debts under the first application, an anomalous situation would have resulted. We think the orderly administration of justice could have been accomplished only through the method

adopted by the District Judge by denying the discharge under the second application as to common debts, and granting it as to others. The order of the District Court to this effect is affirmed.

[fols. 89-91] IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT

Extract from the Minutes of November 27th, 1923

[Title omitted]

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Samuel Freshman, and the surety on the appeal bond herein, Massachusetts Bonding & Insurance Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 92] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR REHEARING—Filed Dec. 17, 1923

To the honorable the judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Samuel Freshman, appellant, petitions that the court set aside its order entered herein on November 26th, 1923, affirming the orders of the District Court of the United States, for the Northern District of Texas, entered June 9th, 1923, and June 18th, 1923, in the cause pending on its bankruptcy docket numbered 1814 in bankruptcy, re Samuel Freshman, bankrupt, that the court grant [fol. 93] a rehearing on this petition and that on such rehearing the said orders of the district court be reversed and appellant granted a complete and final discharge, all costs being taxed against appellee. As grounds for such petition, appellant submits the following:

1. There being no appropriate pleading presenting and no proof supporting either objection or specification of objection to a complete and final discharge of appellant in this case, it was the duty of the district court and is the duty of this court to grant the discharge.

2. In concluding that a district judge may deny a discharge in whole or in part, based on his investigation of the merits of the application, when there is no appropriate pleading and no proof supporting objection or specification of objection, this court has erred in disregarding and refusing to follow:

a. The Supreme Court in Bluthenthal v. Jones, 208 U. S. 64.

b. The interpretation (dictum) of that Supreme Court decision heretofore given by this court, in re Bacon, 193 Fed. 34, 37.

c. The Circuit Court of Appeals for the First Circuit, in re Marshall Paper Co., 102 Fed. 872.

d. The long line of decisions to the effect that one opposing a discharge must show by clear and convincing evidence that the bankrupt has committed one of six offenses defined in section 14-b of the act, the most recent of several decisions by this court to such effect being Humphries v. Nalley, 269 Fed. 607.

[fol. 94] 3. In concluding that the district court did not err in denying the discharge in part based solely on judicial notice of the status or existence of the earlier bankruptcy proceedings, and in the absence of appropriate objection or specification of objection, and of proof in support thereof, this court has erred in disregarding and in refusing to follow:

a. The long line of decisions that res adjudicata must be pleaded (appellant's brief 14) and proved (appellant's brief 17-18).

b. The long line of decisions that defense of another action pending can be set up only by plea in abatement, and is waived if not so pleaded (1 Corpus Juris 101 and notes) and when pleaded may be sustained only by evidence satisfying the burden of proof (1 Corpus Juris 106 and notes).

4. In concluding that the district court did not err in denying the discharge in part based solely on the status of the earlier bankruptcy proceedings, the court erred, for such status if properly pleaded and proved as a ground for objection, would have constituted no ground for the denial of the discharge in whole or in part.

In the premises, appellant submits that the court has erred in matters of law above set forth and that for each of the grounds referred to, he is entitled to his final and complete discharge as prayed for.

Because the reasons advanced by this court in its opinion for [fol. 95] denying the discharge in part were not referred to by the district court, and because appellant had no occasion to anticipate the reasoning adopted by this court and, therefore, did not refer in his brief to cases which this court may not have had before it and appears to have disregarded, appellant appends to this petition a short argument directed to the new propositions raised in the opinion

of the court and requests the court to consider the same in support of this petition.

Copies of this petition have been duly delivered to appellee.

A certificate in support of this petition is appended hereto.

H. L. Bromberg, Paul Carrington, Attorneys for petitioner.
Etheridge, McCormick & Bromberg, of Counsel.

Dallas, Texas, December 13th, 1923.

CERTIFICATE IN SUPPORT OF PETITION

Each of the undersigned, an attorney and and counsellor duly admitted to practice in this court and an attorney for appellant, in presenting to this court the foregoing petition for rehearing, does hereby certify that in his opinion the petition is well founded and meritorious and that the same is not made for the purpose of delay.

H. L. Bromberg, Paul Carrington.

[fol. 96] ARGUMENT IN SUPPORT OF PETITION

In the absence of appropriate objection and specification of objection to the discharge and of proof in support thereof, the bankrupt is entitled of right to his discharge. The Bankruptcy Act, section 14-b, provides:

"The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustees or other parties in interest at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless * * * (he has committed one of the six defined offenses)"

From a reading of this statute alone it seems clearly intended that the judge shall consider, in passing upon the question of discharge, the application for discharge, the pleading in opposition thereto and such evidence as the parties upon reasonable opportunity so to do shall submit, and that unless it is clearly shown by such evidence that one of the six defined offenses has been committed a discharge shall be granted. This has been the uniform construction of the statute with the exception of the opinions rendered in the present case.

The Supreme Court in Bluthenthal v. Jones, 208 U. S. 64, in the excerpt quoted in appellant's brief, pages 15 and 16, has held that it is the duty of a creditor, if he would prevent the granting of a discharge, to file objections and to prove (p. 66):

"either by the production of evidence or by the showing that in a [fol. 97] previous bankrutcy proceeding it had been conclusively

adjudicated, as between him and the bankrupt, that the bankrupt had committed one of such offenses,"

failing which the judge "was, by the terms of the statute, bound to grant" the application for discharge. In the paragraph so quoted the Supreme Court has stated, as we understand, that the investigation of the merits of the application for discharge which the judge may make, shall be limited to an investigation and consideration of the pleading and evidence before him.

This court has heretofore considered the decision of Bluthenthal v. Jones and its application to the issue of discharge under a second petition. This court said, in re Bacon, 193 Fed. 34, after quoting the paragraph referred to from the Supreme Court opinion (page 37):

"From this it appears to be required that the granting of the discharge under a second petition be resisted by objecting creditors with claims provable under a first petition."

The interpretation placed by this court on Bluthenthal v. Jones is, we submit, clearly correct, and its application to the present case should be conclusive to the effect that in the absence of appropriate resistance by any party in interest the discharge should be granted.

The Circuit Court of Appeals for the First Circuit carefully considered the purpose and effect of the clause in the statute directing the judge to "investigate the merits of the application": in re Marshall Paper Company, 102 Fed. 872. Judge Lowell, sitting in the District Court of Massachusetts, held that there was no merit in the application for discharge on a ground not specified by credi- [fol. 98] ters: in re Marshall Paper Company, 95 Fed. 419. The district judge relied on the clause in question (p. 422):

"It should be observed, however, that under the existing bankruptcy act the duties of the judge regarding discharge are more onerous that those imposed by the Act of 1867. He is directed to 'investigate the merits of the application', and hence is not confined to the consideration of those objections to the discharge which are properly set forth by creditors."

The Circuit Court of Appeals unanimously reversed Judge Lowell. After quoting section 14-b of the Bankruptcy Act and stating that the bankrupt is entitled to a discharge as a matter of right, provided he has not committed one of the offenses enumerated, the court said (102 Fed. 874):

"By this provision, the judge shall hear the application and discharge the applicant unless he is found guilty of some one of the prescribed offenses. The court is not authorized to deny the application for discharge upon a ground not set forth in this section. In re Black (D. C.), 97 Fed. 493. A refusal to grant a discharge cannot be said to rest in the discretion of the Judge. The words, 'investage the merits of the application,' must be taken in con-

nection with the context. To construe these words as if they stood alone and disconnect them from what follows would be to leave the whole question of discharge in the discretion of the court. Looking at the entire section, we do not think these words will bear such a construction, however desirable it may seem to the court in [fol. 99] a particular case to so interpret them. It seems to us that Congress in this section clearly specifies the only causes for which a discharge can be denied, and leaves to the court the sole duty of deciding, after due hearing, whether such cause exists.

"When the bankrupt files his petition for a discharge, the only facts pleadable in opposition thereto are those which show that, under the provisions of section 14, he is not entitled to a discharge. In other words, it must be shown that he has committed some one of the offenses described; otherwise the judge 'shall' discharge the applicant."

We submit that this decision which has been cited with approval in many subsequent cases, though none of the subsequent cases appear to have raised the issue now under discussion, is clearly correct. It is consistent, whereas we submit the opinion of this court herein is inconsistent, with the long line of decisions by this and all other Circuit Courts of Appeals to the effect that a discharge must be granted, unless the commission of one of the six offenses "be shown by clear and convincing evidence." Cases by this court to such effect are:

Humphries v. Nalley, 269 Fed. 607;
Garry v. Jefferson Bank, 186 Fed. 461;
Hardie v. Swafford Bros. Dry Goods Co., 165 Fed. 588.

At least one decision to the same or a similar effect has been rendered by each of the other Circuit Courts of Appeals.

The imposition of such a burden of proof upon the one opposing a discharge is meaningless, if the judge on his own initiative may investigate the merits and deny the discharge solely upon such in- [fol. 100] vestigation. No reason is perceived why, if such an investigation be permitted, it would be limited to an investigation by the judge of the records of his own court, or to matters of which it has been heretofore decided that a court may, under proper pleading and proof, take judicial notice. Even if the investigation be limited as suggested, many of the evils of star chamber proceedings would necessarily be attendant, and the granting or denying of a discharge might be made in some cases a matter entirely discretionary with the judge, and practically impossible of review.

For example, if in a previous suit by Atkins against Freshman, in the judge's court, the uncontradicted evidence supporting a default judgment in favor of Atkins on his debt, had shown that Freshman had obtained money from Atkins upon a materially false statement in writing made by Freshman for the purpose of obtaining credit from Atkins, would the judge in a later bankruptcy proceeding filed by Freshman, in which no objection had been made to his

discharge, be justified in taking cognizance of the record of evidence in the preceding case and in denying the discharge on his own initiative on such account? Our courts have uniformly held, pursuant to the deep-rooted Anglo-Saxon conception of litigation, that the decision of a cause must depend upon the issues raised by the parties and upon the evidence introduced. Inquisitorial methods of procedure known in the civil law have never been adopted by our courts. In the hypothetical case, the uncontradicted evidence in the earlier case, even should it have been explicitly adjudicated to have been true and correct, could not properly be considered by the judge [fol. 101] in the later case, certainly unless properly introduced in evidence on proper issues raised by pleadings. Res adjudicata must be pleaded and proved.

The present case is, we think, more clearly unjustifiable than the hypothetical one. The district judge when considering the recommendations of the referee herein took judical notice not of any previous adjudication but merely of a pending case in which had been filed a narrative of testimony unsigned by witnesses or by stenographer with an attached set of conclusions thereon not signed or finally approved by a deceased master who, it is shown, considered the conclusions therein expressed as merely tentative, there being also attached a recommendation by a newly appointed referee who had not heard the witnesses testify, resting solely on the tentative conclusions of his predecessor. Based solely on judicial notice of the pendency of such a case containing such a record, a discharge herein was denied. On which one of the six grounds enumerated in the statute can such a denial be based?

The denial of the discharge in part herein can be justified only by the determination by this court that the investigation by the judge properly showed that appellant had committed one of the six offenses defined in section 14-b. In his written opinion (Tr. 32-37) the district judge did not refer to his investigation other than to show the pendency of the earlier proceeding; his opinion does not indicate any conclusion that any one of the six defined offenses had been committed. The discharge herein was denied solely because of laches in the earlier proceeding and that is not a proper ground for denial of a discharge (appellant's brief 26-31).

A more clear example of the injustice of a procedure which would [fol. 102] permit the judge to take cognizance of grounds for denying a discharge and to deny a discharge on such grounds in the absence of opposition, could not be presented; even if laches were a valid ground for denying a discharge, delay could not be held conclusive; explanation for it should be permitted and an opportunity for such explanation is not afforded when in the absence of pleading or proof relating to the question, the judge may at his discretion determine the question based upon an investigation made upon his own initiative.

There is in substance the same sort of controversy involved in the present case, though other creditors are also here involved, as there would be if Atkins were prosecuting a suit against Freshman on his debt. The question in each case is whether the debt of Freshman to

Atkins is and shall remain a subsisting obligation. The court is not a guardian or trustee for either of the parties in either case. Atkins, let us assume, filed suit and upon a trial after due hearing it was finally determined that he should take nothing. If thereafter Atkins should bring a second suit on the same indebtedness, it would be the duty of the court clearly, if Freshman did not plead res adjudicata and was in default, to render judgment for Atkins on the same claim which had been previously determined to be unfounded. In such event the duty would have been upon Freshman to plead his defense in the second suit by res adjudicata or otherwise to avoid a default. If by paying court costs and expenses incident to repeatedly unsuccessful litigation, Atkins could finally obtain a judgment by [fol. 103] default, the judgment would nevertheless be valid. Courts have uniformly so decided. Res adjudicata must be pleaded and proved.

With even greater reason, the courts have also decided uniformly that the defense of a suit pending must be pleaded and proved or else is waived: 1 Corpus Juris, 101 and notes, 106 and notes; In re Buchan's Soap Corporation, 169 Fed. 1017; Stephens v. Monongahela Bank, 111 U. S. 197.

The opinion of the district court herein, shows that the discharge was denied in part herein, not because the judge after investigation had concluded that the bankrupt had committed one of the six defined offenses, but because he had concluded that the bankrupt had been guilty of laches in not obtaining a determination of the first suit. The judge had control of the cases on his docket, and in permitting the later case to be submitted to him for determination first, in overruling the motion for rehearing in the later case while the motion in the first was still pending, and in permitting such motion to remain pending until this appeal is determined, has shown that the issue in neither case now involves the question whether in fact appellant committed one of the six offenses. There remains no proponent insisting that appellant did so, in either case. The only issue in either case is one of law, as the district court has treated the two cases; the issue in the first, whether laches has precluded the bankrupt from a discharge; the issue in the second, whether laches in the first case can in any way affect the right of the bankrupt to a discharge in the absence of opposition.

An affirmance of the case in the circumstances, is an approval of the conclusion that laches in the first proceeding precludes a dis- [fol. 104] charge as to the debts in question, in both proceedings. That issue decided here in the affirmative will determine the case still pending in the district court; determine it not on the issue once raised but long since abandoned by the deceased opposition, but on an issue of law squarely raised in the present record, whether laches, found by a court on its own motion, without pleading or proof, is a ground for denial of a discharge.

In affirming this case, this court will hold that it is a valid ground, and in addition that a court may invoke laches in a previous case as a ground for denying a discharge in a second case, in the absence of pleading and of proof.

If the district judge is affirmed in the present case, will not his denial of a discharge in the case still pending before him follow as a matter of course, and be justified—a denial on the ground of laches, and also on the ground that, by judicial notice of records in his own court, on his own initiative, he will know that a discharge as to all debts then before him will have been finally denied, and the denial affirmed by this court?

In the premises appellant submits that this court has erred in affirming the orders of the district court and that on rehearing the discharge as prayed for should be granted.

H. L. Bromberg, Paul Carrington, Attorneys for Appellant
Etheridge, McCormick & Bromberg, of Counsel.

Dallas, Texas, December 13th, 1923.

[fol. 105] In United States Circuit Court of Appeals

[Title omitted]

Order Overruling Petition for Rehearing

Extract from the Minutes of December 24th, 1923

It is ordered by the Court that the petition for re-hearing, filed in this cause, be, and the same is hereby, denied.

[fol. 106] In United States Circuit Court of Appeals

Clerk's Certificate

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 83 to 105 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said court, numbered 4136, wherein Samuel Freshman is appellant, and W. S. Atkins is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 82 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 17th day of January, A. D. 1924.

Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal of United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 107] IN SUPREME COURT OF THE UNITED STATES

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

ORDER GRANTING PETITION FOR CERTIORARI—Filed April 7, 1924

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Fifth Circuit and of the argument of counsel thereupon had,

It is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.